

DISCUSSION DRAFT AUGUST 2, 2012

CONFIDENTIAL-FOR SETTLEMENT PURPOSES ONLY

PARTICIPATION AND COOPERATION AGREEMENT

THIS PARTICIPATION AND COOPERATION AGREEMENT (this “Agreement”) is made as of this ____ day of _____, 2012, between and among each of the respondents (hereinafter the “Settling Parties”) to that certain Administrative Settlement Agreement and Order on Consent for a Removal Action, CERCLA Docket No. 02-2012-2015, (hereinafter the “AOC”), Occidental Chemical Corporation (hereinafter “Occidental”), the respondent to that certain Unilateral Administrative Order, CERCLA Docket No. 02-2012-2020 (hereinafter the “UAO”). Tierra Solutions, Inc. (hereinafter “Tierra”) joins this Agreement on behalf of Occidental, but only to the extent it is performing the measures set forth in paragraph 3 of this Agreement.

WHEREAS, the AOC requires the Settling Parties to perform a time-critical removal action in the vicinity of River Mile 10.9 of the Lower Passaic River (the “Removal Action”); and,

WHEREAS, the UAO requires that Occidental participate and cooperate with the Settling Parties in the performance of the Removal Action; and,

WHEREAS, the EPA requires that the Settling Parties cooperate in good faith with Occidental as a UAO recipient in performance of the Removal Action; and,

WHEREAS, as set forth in this Agreement, Tierra has offered, on Occidental’s behalf, to perform certain specified portions of the Removal Action, and the Settling Parties have accepted said offer; and,

WHEREAS, without admitting any fact, responsibility, fault or liability in connection with the UAO or the AOC, the Settling Parties, Occidental and Tierra on behalf of Occidental hereby enter this Agreement to govern Occidental's and the Settling Parties' mutual participation and cooperation in the Removal Action.

NOW THEREFORE, in consideration of the foregoing, the Settling Parties, Occidental and Tierra on behalf of Occidental mutually agree as follows:

1. Purpose. It is the purpose of this Agreement that the terms hereof shall control the manner and means by which the Settling Parties and Occidental will:
 - a. participate and cooperate in the Removal Action;
 - b. define Occidental's obligations to perform certain specified measures in support of the Removal Action;
 - c. provide for sharing of information related 10.9 Removal Action; and,
 - d. govern the tolling of certain claims among the Settling Parties and Occidental.
2. Recognition of good faith offer. The Settling Parties hereby acknowledge that Occidental's offer to participate and cooperate in the Removal Action constitutes a "good faith offer" as that term is used in the UAO.
3. Scope of Occidental's Participation in Removal Action. As its participation in the Removal Action, Occidental and Tierra on behalf of Occidental agree to perform certain measures to make available to the Settling Parties the existing upland processing facility ("UPF") sited and constructed by Tierra Solutions, Inc. ("Tierra") for Phase I of the Non-Time Critical Removal Action performed at River Mile 3.2, as follows:

- a. Tierra, on behalf of Occidental, shall negotiate a twelve-month extension to the ground lease (the "Lease") between Tierra and Morris Fairmont Associates for the UPF, which shall run from November 1, 2012 to October 31, 2013 (the "Lease Extension"). The Lease Extension shall provide that the Lease may be assigned to the Settling Parties.
- b. Tierra, on behalf of Occidental, shall pay the Lease rent and maintain any financial assurance and insurance coverage required under the Lease for the first nine months of the Lease Extension.
- c. After the first nine months of the Lease Extension, Tierra, on behalf of Occidental, shall assign the lease to the Settling Parties, who shall then pay rent and maintain insurance and financial assurance requirements.
- d. Tierra, on behalf of Occidental, shall negotiate with ARCADIS to extend Tierra's contract for Phase I of the Non-Time Critical Removal Action to allow the four (4) UPF sediment presses, the three (3) sludge holding tanks and the process water tank to remain at the UPF site until October 31, 2012 (the "Contract Extension"). Tierra, on behalf of Occidental, shall formally amend the Contract to include the Contract Extension.
- e. Tierra, on behalf of Occidental, shall arrange for the dewatering equipment to remain onsite until October 31, 2012.
- f. Tierra, on behalf of Occidental, shall pay ARCADIS the costs associated with the Contract Extension through October 31, 2012.

- g. Tierra, on behalf of Occidental, shall take reasonable measures to facilitate the transfer of permits (CERCLA permit equivalencies (PEs)) related to the UPF (property use and plant operations), including Land Use (Waterfront Development and Flood Hazard Area and Water Quality Certification), Air Pollution Control, and Surface Water Discharge, to the Settling Parties. Accomplishing the transfer of these permits, however, shall be the responsibility of the Settling Parties.
- h. Tierra, on behalf of Occidental, will transfer ownership to the Settling Parties of the sheet piling that it used in the Phase I Non-Time Critical Removal Action, which the Settling Parties thereafter can utilize in the Removal Action and/or sell for scrap metal or other recycling or reuse after completion of the Removal Action. Settling Parties will pay all costs associated with handling, transportation and any storage.

Occidental's participation in the Removal Action is limited to the above-listed items, and shall not be expanded or broadened in any manner without the express written consent of Occidental.

4. Scope of Settling Parties' Obligations to Occidental. The Settling Parties are required to perform the Removal Action and shall control the performance of that Removal Action.

Notwithstanding the Settling Parties' entitlement to control the performance of the Removal Action, Settling Parties agree to the following:

- a. Settling Parties shall provide Occidental the following data and information within ten days of receipt or transmittal, whichever is earlier: copies of all written communications (electronic or hard copy) with EPA, NJDEP, or other

government entity; draft and final work plans; draft and final design reports; draft and final sampling plans; draft and final monitoring plans (including work plans for in-river monitoring outside of the dredging area); analytical data for sediments and water column; operational data and reports from the dredging and dewatering processes; and operational data from the dewatering process.

- b. Settling Parties agree to provide any other documents or information related to the Removal Action to Occidental upon request. Settling Parties shall provide such data within five days of receipt of such a request. This obligation to provide documents or information does not extend to privileged documents or information, as defined by Paragraph 36 of the AOC. If the Settling Parties claim that any document or information requested by Occidental is privileged, Settling Parties shall substantiate the claim of privilege, in the same manner as is required by Paragraph 36 of the AOC, within five days of receipt of such a request.
- c. Settling Parties agree to provide Occidental with draft copies of all deliverables and reports to be made to EPA pursuant to the AOC at least thirty days before the due date.
- d. Occidental has the right to comment upon all deliverables and reports to EPA. This comment period shall last 15 days after Occidental receives such deliverables or reports. Settling Parties agree to make reasonable efforts to ensure that technical personnel working on the removal action are available to answer questions during this comment period.

- e. Settling Parties agree to consider Occidental's comments in good faith before submitting deliverables and reports to EPA. Should the Settling Parties decline to incorporate any of the comments made by Occidental, the Settling Parties will, within 15 days of receipt of such comments, provide Occidental with a concise written summary of the reasons underlying the decision not to incorporate such comments.
 - f. Settling Parties shall have no obligation to consider or respond to comments that are submitted less than five days before the due date of the relevant deliverable or report.
5. Updates. Settling Parties agree to provide Occidental a monthly briefing regarding the status and progress of the Removal Action. These updates may be provided through an in-person meeting or via teleconference. Settling Parties shall ensure that technical personnel are present at such meetings to answer questions from representatives of Occidental.
6. Denial of Liability. This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of liability, law or fact, a waiver of any right or defense, or an estoppel against Settling Parties, Occidental or Tierra. Nothing in this Section is intended or should be construed to limit, bar, or otherwise impede the enforcement of any term or condition of the Agreement against any party to this Agreement.
7. Tolling Agreement. Settling Parties, Occidental and Tierra hereby agree to toll any and all claims among and between them arising from the Removal Action, including claims under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, the New Jersey Spill Act, the common law, the Lower Passaic River Study Area Site

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Cooperating Parties Group Amended and Restated Organization Agreement, or any other legal or equitable claim whatsoever, as follows:

- a. Settling Parties, Occidental and Tierra agree not to assert any legal or equitable claims against the other party, of any nature whatsoever, seeking recovery of past or future costs incurred in connection with the Removal Action claims until one of the following conditions occurs: (i) when any of the parties is subject to a court order requiring that those claims be brought in a then-pending judicial action or be waived; (ii) when EPA signs a Record of Decision (“ROD”) for the LPRSA following the completion of the RI/FS; (iii) when EPA signs a ROD for the Newark Bay Study Area following the completion of the Newark Bay RI/FS; or (iv) for claims against any party that enters bankruptcy proceedings, in which event the other parties may assert claims against that party in the bankruptcy proceedings.
 - b. Any and all statutes of limitations applicable to any claims covered by this Paragraph 7 shall be tolled until the occurrence of one of the conditions set forth in Paragraph 7.a.
8. Successors and Assigns. This Agreement shall be binding upon the successors and assigns of the Settling Parties, Occidental and Tierra. Occidental may assign its rights and obligations under this agreement to Maxus Energy Corporation or Tierra.
9. Effective Date, Method of Execution. The Effective Date of this Agreement shall be [date]. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

10. Amendments. This Agreement may be amended only by the unanimous written consent of both the Settling Parties and Occidental.

11. Separability. If any provision of this Agreement is deemed invalid or unenforceable, the balance of this Agreement shall remain in full force and effect.

12. Law. This Agreement shall be interpreted under the laws of the State of New Jersey without reference to its conflict of laws rules.

13. Entire Agreement. This Agreement constitutes the entire understanding of the Settling Parties and Occidental with respect to its subject matter.